No. 20929

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

WILLIAM D. PEDERSEN,

Appellee.

On Appeal From the United States District Court for the Southern District of California.

BRIEF FOR THE DEFENDANT-APPELLEE.

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Jurisdictional Statement.

This action was commenced by the United States, pursuant to 28 U.S.C. 1345 upon complaint alleging an erroneous payment of severance pay to defendant-appellee upon his release from the United States Marine Corps. A judgment for defendant was entered on February 15, 1966 [R. 92]. Notice of appeal was filed on April 5, 1966 [R. 93]. This court has jurisdiction to entertain the appeal pursuant to 28 U.S.C. 1291.

Statement of the Case.

On September 15, 1958, appellee was separated from the United States Marine Corps, and was paid $12,-465.17 by check which represented all monies due him including his earned basic pay, subsistence allowance, quarters allowance, mileage allowance, severance pay, and unused leave pay [Tr. 124]. On January 19, 1959, by letter [Pltf. Ex. 6], the Marine Corps demanded $10,065.00 from appellee explaining that an administrative examination section of the Marine Corps had determined this to be an overpayment. On February 7, 1959, appellee answered this demand by letter [Pltf. Ex. 7] which took exception to the Marine Corps' demand, and offered to accept a limited recall to active service to prove his entitlement to severance pay. The Marine Corps refused this offer, and in the same letter admitted that the appellee had actually not been paid all of the $13,220.00 severance pay but merely that such sum had been credited on the appellee's pay record [Pltf. Ex. 8]. Following this, in June 1959, appellee wrote to the General Accounting Office offering his cooperation, but specifically explaining, irrespective of any final determination as to his entitlement or nonentitlement to severance pay, that the Marine Corps' demand for $10,065.00 was erroneous in that it was merely charged to appellee on the Marine Corps accounting system, and that a considerable portion of that sum had actually been disbursed to the United States Tax Collector, allegedly on behalf of appellee [Pltf. Ex. 5]. Appellant has never denied this.

Notwithstanding the foregoing, appellee was sued by appellant in March 1961, Civil. No. 367-61-HW, the complaint demanding the full sum with interest from January 19, 1959. At the pre-trial hearing in the matter on October 3, 1961, appellant expressed doubts regarding the merits of its claim and the suit was ordered dismissed without prejudice [Ex. "A" to Motion to Dismiss Appeal dated November 18, 1964, on file in this court]. The present case, filed May 20, 1963 was initially tried in the lower court on January 17, 1964, the appellant again demanding $10,065.17 with interest from January 19, 1959. The initial trial having resulted in a judgment for appellee, an appeal was taken, resulting in a reversal in this court which remanded "for a new trial which will permit each side to offer the evidence it believes should be considered by the trial court" [R. 86].

At the instant trial, the parties stipulated to the admission of all evidence admitted at the first trial [Tr. III 4]. Appellant introduced new Plaintiff's Exhibit 10, Marine Corps Order 1900.1B, Plaintiff's Exhibit 11, Navy Controllers Manual, and Plaintiff's Exhibit 12, which was offered as a complete copy of appellee's service medical record. The appellant called a Navy Finance Officer as an expert witness who testified *inter alia* that the computation of severance pay in appellee's pay record was correct [Tr. III 31], that according to statute of the Congress of the United States payment of severance pay was only proper if specified in

appellee's orders [Tr. III 24]. Although the witness testified that appellee's release orders were separation orders [Tr. III 27], on cross-examination the witness stated that a waiver which is required by Marine Corps Order 1900.1B [Pltf. Ex. 10] to be included in orders of separation cannot be found in appellee's release orders [Tr. III 30]. The appellant called a Senior Naval Medical Officer as an expert witness who testified from the medical record of appellee [Pltf. Ex. 12], and detailed appellee's service medical history particularly with regard to sinusitis, associated respiratory problems, and treatments given, also testified that if appellee had had a cold at the time he was grounded, due to atmospheric changes, that could affect his sinuses [Tr. III 53]. The witness further commented on the frequent and chronic respiratory infections, nasal trouble and some with his sinuses, but commented that based upon all the record, including the entry of September 10, 1958, disability was not reflected [Tr. III 48].

Following arguments, the court again expressed dissatisfaction with the state of the evidence and accordingly entered judgment for appellee. Again the Government has appealed.

Argument.

Appellant's specification of error 1 asserting that the district court erred in holding that the Government had failed to establish by the evidence its entitlement to recover judgment against appellee is completely without merit. Had the district court been satisfied with all of the other evidence presented by the Government, which the court obviously was not, it would still have found it virtually impossible to give a judgment to the appellant owing to the financial accounting proof presented by the appellant. On page 13 of appellant's brief on appeal, appellant states that appellee received $13,220.00 severance pay upon his release from active duty in 1958. That statement is incorrect. This court need only refer to appellant's own evidence to observe this. Plaintiff's Exhibit 8, a letter from the Marine Corps to appellee dated February 17, 1959, in paragraph 3 the following statement appears: "In my previously mentioned letter I indicated that you received the amount of $13,220.00. The intent here was to reflect the amount credited on your pay record for severance pay, not the amount received." This was commented upon at the first trial by the district court as follows: "Now, the government says in its complaint that it is entitled to $10,065. In other words, the government contends that the defendant was entitled to $3,185.00, I believe it is, and so they have deducted that from the amount set forth, $13,220.00, and they come up with a figure of $10,065. The government absolutely disregards the $2,624.10 withheld by the government and paid over to

the Internal Revenue Department. The government takes the position that the defendant received $13,220.00. He didn't. He received $13,220.00 less possibly $2,-624.10 on withholding tax. In one of the letters written by the defendant to the government, the defendant calls attention to the fact that this money was withheld. The government evidently took the position, 'Well, that's just too bad. We want the entire amount. If we withheld anything illegally or unlawfully, then you can make a demand upon Internal Revenue and you can get it back, if you can.'" [Tr. II 89]. The Government did not introduce any new evidence at the second trial to resolve the obvious discrepancies between its evidence and its demands, so the question remains problematical, and judgment for appellant would have been difficult if not impossible under any circumstances. It also follows that, from 1958 to the present date the government has still not made a proper demand on the appellee for any sum of money which it actually did pay to him.

More cogent reasons than the above exist for the district court's not having found for the appellant, however.

Although Title 10, Section 1203, U.S.C., when considered with the other evidence in this case, allowed a person in appellee's category separation with severance pay upon a determination of entitlement thereto by the Secretary of the Navy, the only evidence, basically, which was introduced by appellant to refute entitlement to severance pay was a faulty set of appellee's release orders and an incomplete medical record.

The Navy Controllers Manual [Pltf. Ex. 11] states in part, "Members separated for physical disability will be entitled to disability severance pay if such entitlement

is specified in the separation orders." It should be noted that the Manual does not prescribe that this is the only means by which entitlement to disability severance pay is determined, nor could it since such power vests in the Secretary of the Navy, not in the Controller. But appellant, in attempting to show nonentitlement of the appellee to severance pay, has introduced appellee's release orders [Pltf. Ex. 1] and contended that there are separation orders in order to show that as separation orders, they do not contain a statement of entitlement to severance pay, thus creating an inference that the Secretary of the Navy had not determined entitlement to severance pay. However, Marine Corps Order 1900.1B [Pltf. Ex. 10] para. j(3)(c) recites as follows:

> "The following will be included in orders to release from active duty: A signed certificate that becomes a part of the orders for separation that states 'Having been advised that I may not receive either disability severance pay from the Marine Corps or disability compensation from the Veteran's Administration in addition to readjustment pay, I hereby elect to receive lump-sum readjustment payment.'"

Examinations of appellee's release orders [Pltf. Ex. 1] will show no such certificate, and since the subject matter of this certificate goes to the very heart of the question of entitlement to severance pay or only readjustment pay, its omission casts serious doubt as to their being considered the separation orders contemplated by the Navy Controllers Manual.

Appellant's other new evidence at the instant trial was a copy of what appellant describes as a complete

medical record of appellee. This exhibit [Pltf. Ex. 12] details a history of sinusitis and related chronic respiratory infections from 1953 through 1958 that very closely corroborates the testimony of appellee [Tr. II 46-54]. The last entry in 1958 shown in this medical record, however, is dated September 10, 1958, and it depicts no disability; but there is some confusion regarding this inasmuch as one page of the exhibit indicates that the examinee was a Master Sergeant in the U.S. Marine Corps as distinguished from U.S. Marine Corps Reserve. There is no indication in the record that the appellee has ever been a Master Sergeant in the U.S. Marine Corps. What is more important about this exhibit is that there is apparently no record of appellee's final medical examination in the record. Marine Corps Order 1900.1B [Pltf. Ex. 10] para. 3.c. states: *"Physical Examination Prior to Release From Active Duty.* Within 72 hours prior to release, each reservist shall be physically examined and a report thereof submitted in accordance with paragraphs 15-48, 15-49 and 15-76(2), of the Manual of the Medical Department, U. S. Navy." The uncontradicted evidence in this case is that appellee was separated on September 15, 1958 some five days after the date of the last 1958 medical entry in the exhibit. The results of his examination within 72 hours of his release are simply missing.

The appellant may believe that the person who disbursed severance pay to appellee failed to follow regulations, that the person who audited appellee's pay record erred, that regulations were not followed in failure to include the all-important waiver of severance pay in appellee's orders, and that contrary to regulations, there was no medical examination of appellee within 72 hours

of his release, but the district court was, understandably, looking for proof and not supposition. Also, it should be noted, contrary to the contention of appellant's Navy Finance Office expert witness that U.S. statutes require entitlement to severance pay to be specified in separation orders, no such statute is to be found.

Proceeding to appellant's specification of error 2, having failed to produce any direct evidence to prove that a mistake had been made in appellee's pay record [Pltf. Ex. 2], and appellant's inferential evidence having proved defective, it is now contended that the burden of proving the case should have been placed upon appellee. The appellant, by its complaint, and by the audited pay record of appellee [Pltf. Ex. 2] has shown that severance pay was paid to appellee. Appellee has concurred with this fact. With this specification of error, appellant is contending that appellee's concurrence with appellant's records shifts the burden to appellee to prove that those government records are correct. A detailed discussion of the cases appellant has cited in support of this unusual contention is not seen as necessary; the holdings in *Selma, R&D Co. v. U.S.*, 35 L. Ed. 266; *United States v. Denver & R.G.R.R.*, 48 L. Ed. 106; *Fleming v. Harrison*, 162 F. 2d 789, and *Logan v. Freerks*, 103 N.W. 127, are all typified by the United States Supreme Court holding in the *Selma* case as follows: "The burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge or of which he is supposed to be cognizant." That the actions which have been taken by appellant lie more within appellant's knowledge than appellee's is beyond question.

Appellant's specification of error 3 directed to the district court's finding that the Secretary of the Navy had determined that appellee was eligible for and entitled to severance pay, merits discussion. As the district court remarked to counsel during the course of the trial, "There is nothing here to show that he was separated because of disability. The record doesn't show that." [Tr. III 69]. That is certainly true. There was absolutely no direct evidence one way or the other before the district court which would have set the question at rest. The appellant had produced no direct evidence on the question, and therefore it is necessary to proceed from the one unassailable document which was in evidence to the only logical conclusion. Appellee's pay record [Pltf. Ex. 2] was introduced by appellant, and both of appellant's expert witnesses testified that it was computed correctly. Colonel McKean's testimony was, "First, looking at Exhibit 2, this pay record was closed out, as we call it, all credits were extended of the Major's basic pay, his subsistence allowance, his quarters allowance, his mileage allowance, severance pay, 60 days lump sum leave settled for, unused leave. The same thing was done for his income tax. His pay record was then balanced and the net amount due him was $12,465.17, for which a check was drawn to his order on the 14th of September, the day before his release from active duty was effected." [Tr. II 24]. From the audited pay record, proper on its face, and from the fact of payment of severance pay, appellee believes several time-tested presumptions support the district court's finding regarding the Secretary of the Navy's determination of appellee's eligibility and entitlement to severance pay. In *American Railway Express Co. v.*

A. J. Lindenburg, 260 U.S. 584, 67 L. Ed. 414, the U.S. Supreme Court held, "When an act is done which could be done legally only after the performance of some prior act, proof of the latter carries with it the presumption of the due performance of the prior act." Accord: *Hook v. St. Louis Pub. Serv. Co.*, 296 S.W. 2d 123, "Facts consistent with legality are presumed to exist". In *R. H. Stearns Co. v. U.S.*, 291 U.S. 54, 78 L. Ed. 647, the United States Supreme Court held: "Acts done by a public officer which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter." And when the district court commented, "It seems to me that when a person joins the armed services and is discharged, that he is entitled to rely upon the records as maintained by the government, and unless the government can show that there has been an absolute mistake, why, I don't think he should be called to account to return the money some six, seven, eight, ten, 15 or 20 years later." [Tr. III 83], the court may have had in mind the following United States Supreme Court holding from *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 71 L. Ed. 131:

> "In the absence of *clear evidence to the contrary* (emphasis supplied), courts presume that public officers have properly discharged their official duties."

Regarding appellant's specification of error 4, the district court did not hold that persons receiving overpayments from the Government are entitled to rely on Government pay records which, although erroneous in fact and law, are not erroneous on their face. No dis-

cussion of this specification of error is considered necessary.

Appellant's specification of error 5 that the district court erred in failing to rule that the Government may recover public funds erroneously disbursed together with interest thereon is merely inappropriate to this case in view of the district court's findings that funds were not erroneously disbursed.

Conclusion.

Appellee submits that in view of all of the facts and circumstances presented, and for all of the reasons outlined in the preceding paragraphs of this brief, the district court could not have found otherwise than it did, and judgment for the defendant should be affirmed. It should be noted that appellant has been accorded three separate opportunities in the lower court to prove its case commencing early in 1961. It is believed that appellant has had its day in court.

Respectfully submitted,

ROBERT W. FRASER,
Attorney for Appellee.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

ROBERT W. FRASER